



WAYNE COUNTY

Family Law Bar Association

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June 1, 2005

Via Email: MSC_clerk@courts.mi.gov
Michigan Supreme Court Clerk's Office
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2003-62
Proposed Adoption of new Michigan Rules of Professional Conduct

Dear Honorable Justices of the Supreme Court:

I am writing on behalf of the Wayne County Family Law Bar Association. Since 1998, this organization has represented Wayne County's family law practitioners. We have monthly meetings where featured speakers discuss developments in the law and social issues affecting the family members we represent. Last year, our Nuts & Bolts Seminar drew over 70 participants. This year, over 80 members of the Bar signed up for the seminar. We regularly communicate with, and are part of the fabric of the lawyers we serve. On March 17, 2005, our organization discussed at length the proposed amendment to MRPC 1.5, adding paragraph (f) and its subparts, to specifically address lump sum or non refundable fee agreements (also commonly referred to as minimum fee or non refundable retainers). After considerable discussion, the Wayne County Family Law Bar Association unanimously opposed the proposed language of MRPC 1.5(f). It did however support an amendment to MRPC 1.5 to add subsection (f) to provide as follows:

"The lawyer and the client may agree to a lump sum or non refundable fee arrangement, that is earned by the lawyer at the time of the engagement, provided that it is in writing."

Subsequently, at our Annual Meeting held on May 19, 2005, we reviewed and discussed the decision of the State Bar of Michigan Representative Assembly which also addressed MRPC 1.5(f) at its April 16, 2005 meeting. On information and belief, they too objected to the proposed changes to MRPC 1.5(f), and adopted as an alternative:

"A lawyer and a client may agree to a lump sum or non refundable fee arrangement, that is earned by the lawyer at the time of engagement (or at the time of the agreement), provided that the agreement is in writing, signed by the client, and states that the fee is non refundable."

The Wayne County Family Law Bar Association, at its Annual Meeting, unanimously adopted the aforesaid language, and would urge this Honorable Supreme Court to do so as well.

There were a number of reasons why our Association's members believe the present proposed amendment should be rejected. Besides the fact that it is not always possible to determine with precision how "complex" a case may be (as referenced in MRPC 1.5(f)(1)), it is often difficult, if not impossible, in the early stages of your representation, to determine your client's intelligence, maturity, or sophistication (as referenced in MRPC 1.5(f)(3)). If an attorney believes that their client is incompetent to contract, the appropriate thing may be to seek a Guardian Ad Litem.

Our membership was also concerned as to how one may track turning down other cases, or the extent to which the attorney marshals law firm resources in reliance on the fee agreement. Most family law practitioners don't have the resources to have time and cost management studies done of their office, much less maintain such statistics. Besides which, if ever challenged on this subject, a prospective client's mere contact with a law firm may be a privileged fact. Would an attorney have to disclose the names and circumstances of clients whose cases they had to turn down, in order to meet a challenge as to whether or not their non refundable retainer met the provisions of proposed MRPC 1.5(f)(4)? It appears that would place an attorney in an ethical dilemma regarding the confidentiality of the contact made with them by other prospective clients.

When you take on a family law case, you have committed your time and professional services. You have appeared formally or informally on a client's behalf, in a situation requiring your skills, experience and knowledge. Not only does the degree of that commitment affect your willingness and ability to undertake other prospective cases, you are assuming significant responsibilities. The client is receiving the value of that commitment. Why shouldn't an attorney, who has resolved the matter for which they were retained, be entitled to the entire retainer, as a minimum fee for their services, so long as the terms are in writing, signed by the client?

Also significant is the fact that such a rule would seriously jeopardize cash flow for managing one's practice. Based on statistics compiled by our own State Bar, in its Law Practice And Management section of the State Bar of Michigan, published in its November 2000 Michigan Bar Journal, at the 50th percentile of net income, of 27 other primary areas of practice, family law practitioners were tied at third from the bottom in income. Family law practitioners need the ability to be able to count on a non-refundable fee agreement. If they have been retained, and performed the services rendered, they should be entitled to retain the fee spelled out in their agreement, as compensation for the services they have rendered.

MRPC 1.5(a) already prohibits an excessive fee, and has a standard by which it is determined. As it relates to family law, the subject rule has factors 1 through 7 to guide a subsequent determination of whether or not a lump sum or non refundable fee charged in a particular case, was clearly excessive or illegal. If after an attorney receives a non-refundable retainer fee, but before the client can get the value of any of the attorney's efforts, the client reconciles, or the problem resolves itself, and the attorney's services are not necessary, MRPC 1.5(a) still applies. Where an attorney retains an otherwise non refundable retainer fee, and because of the circumstances such as that suggested above, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee was excessive, the client challenging the retention of a non refundable retainer fee, without receiving any value of the attorney's efforts, would still have a remedy. In other

words, the Rule as it exists already, deals with this issue, so long as one important aspect of the Rule is modified, that being, that lump sum, or non refundable fee agreements that are earned by the lawyer at the time of the engagement, or at the time of the agreement, be in writing, signed by the client, stating that the fee is non refundable. This takes it a step beyond MRPC 1.5(b), which talks in terms of the basis or rate of the fee, and that it . . . shall be communicated to the client “preferably in writing.” For non-refundable retainer fees, it must be in writing.

The Wayne County Family Law Bar Association believes the proposed modifications to MRPC 1 through 4 to be overbroad and invasive. For that reason, we would respectfully request that this Honorable Supreme Court reject the proposed amendments as it relates to MRPC 1.5(f), and enact that recommended by the Wayne County Family Law Bar Association, at its annual meeting on May 19, 2005.

If this Honorable Court subsequently decides to hold a public hearing on this issue, I would respectfully ask permission to address this subject before the court on behalf of the Wayne County Family Law Bar Association.

Respectfully submitted,

Carlo J. Martina,
President
Wayne County Family Law Bar Assoc.